TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 490

CLEARFIELD TRUST COMPANY, A CORPORATION, AND J. C. PENNEY COMPANY, A CORPORATION, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 24, 1942.

CERTIORARI GRANTED DECEMBER 7, 1942.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 4, 1943.

[fol. 1]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF PENNSYLVANIA

Relevant Docket Entries

November 16, 1939—Complaint filed.
February 20, 1940—Answer of defendants filed.
January 7, 1941—Stipulation of Facts filed.
December 19, 1941—Opinion of Court filed.
January 15, 1942—Order of Court filed directing that judgment be entered in favor of defendants and against the United States.
March 18, 1942—Notice of Appeal filed by United States.

[fol. 2] In United States District Court

Complaint.

1. The plaintiff, the United States of America, by George Mashank, its Attorney for the Western District of Pennsylvania, acting under the direction of the Attorney General, and pursuant to the provisions of Section 24 (1) of the Judicial Code (U. S. Code, Title 28, sec. 41 (1)), brings this proceeding against the Clearfield Trust Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and having its principal place of business at Clearfield in the Western District of Pennsylvania, which at all times hereinafter mentioned was engaged in the general business of commercial banking.

2. Defendant is indebted to plaintiff in the amount of Twenty-Four Dollars and Twenty Cents ($24.20), with interest thereon at the rate of 6% per annum from the second day of May 1936 upon a contract of guaranty under the following circumstances.

3. Check No. 4,797,253, dated April 28, 1936, for $24.20, was drawn on the Treasurer of the United States through the Federal Reserve Bank of Philadelphia by L. V. Witcombe, Disbursing Clerk, Treasury Department, symbol 70-01-30, to the order of Clair A. Barner, a copy of which

is annexed hereto, marked "Exhibit A", and made a part hereof.

4. The check was mailed by the drawer by ordinary mail to the payee, Clair A. Barner, at the payee's address, Mackeyville, Pennsylvania.

5. Plaintiff is informed, believes, and therefore avers that the check was never received by the payee.

[fol. 3] 6. Plaintiff is informed, believes, and therefore avers that, on or about April 30, 1936, defendant, Clearfield Trust Company, Clearfield, Pennsylvania, received such check in the regular course of business as a deposit by J. C. Penney Company, Clearfield, Pennsylvania, which Company cashed the check for a person unknown to it or to plaintiff. Defendant endorsed such check in the following form:

"Pay to the order of
Federal Reserve Bank of Philadelphia
Prior Endorsements Guaranteed
60-629 Apr. 30, 1936 60-629
Clearfield Trust Company
Clearfield, Penna.
3-4 Pay to the order of 3-4
Any bank, banker or trust co.
Prior Endorsements Guaranteed
Federal Reserve Bank of Philadelphia."

7. Defendant then transmitted said check to the Federal Reserve Bank of Philadelphia, a depositary of the United States and agent of the Treasurer of the United States, and received payment in the amount of Twenty-Four Dollars and Twenty Cents ($24.20), on May 2, 1936, and the account of the plaintiff in said depositary was charged therewith.

8. The endorsement, "Clair A. Barner", appearing on the back of the check is false, unauthorized, fraudulent and forged, and plaintiff is advised, believes, and therefore avers that, in accordance with section 23 of the Negotiable Instruments Law (Penna. Act of May 16, 1901, P. L. 194), defendant acquired no rights thereunder.

9. Plaintiff is informed by the payee, believes, and therefore avers that the payee did not participate in, and

has never received any part of the proceeds of such fraudulent and wrongful negotiation of the check.

[fol. 4] 10. Plaintiff is advised, believes, and therefore avers that defendant, by reason of the matters set forth hereinabove, became indebted to plaintiff in the amount here claimed upon defendant's express guaranty of prior endorsements.

11. Plaintiff caused notice of the forgery to be served on defendant, and has repeatedly made demand on defendant to pay the amount of the check, but defendant has failed and refused at all times to pay the same.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Twenty-Four Dollars and Twenty Cents ($24.20), together with interest at the rate of 6% per annum, from the second day of May, 1936, and for the costs of this action.

(Signed) George Mashank, Acting United States Attorney for the Western District of Pennsylvania, Attorney for Plaintiff, 633 New Federal Building, Pittsburgh, Pa.

Pittsburgh, Pa, Nov. 16, 1939.

[fol. 5] EXHIBIT "A" TO COMPLAINT

Treasury. Harrisburg, Pa. Apr. 28, 1936
4,797,253

Division of
Disbursement

Treasurer of the United States
Through Federal Reserve Bank of Philadelphia 3-4

Pay in Dollars $ 24 Dollars And 20 Cts. $24.20
To the Order of Clair A. Barner
1665
Object for which drawn
190653
Emergency Relief
Appropriation Act of 1935

L. V. Witcombe
70-01-36

Form Approved by
Comptroller of the Treasury
January 27, 1913

This check must be indorsed in ink or indelible pencil on the line below by the person in whose favor it is drawn, and the name must be spelled exactly the same as it is on the face of the check.

If endorsement is made by mark (X), it must be witnessed by two persons who can write, giving their place of residence in full.

Clair A. Barner
(Sign on this line)
J. C. Penney Co. Inc.
[fol. 6] Received Payment From
The Treasurer of the United States
May 1, 1936
Federal Reserve Bank
3-4 of Philadelphia 3-4
Pay to the order of
Federal Reserve Bank of Philadelphia
Prior Endorsements Guaranteed
60-629 Apr. 30, 1936 60-629
Clearfield Trust Company
Clearfield, Penna.
3-4 Pay to the order of 3-4
Any bank, banker or trust co.
Prior Endorsements Guaranteed
Federal Reserve Bank of Philadelphia.

[fol. 7] In United States District Court

Answer

The defendant, Clearfield Trust Company, a Corporation, by Reed, Smith, Shaw and McClay, its attorneys, for answer to the complaint says:

1. Admits the allegations of paragraph 1 of the complaint.

2. Denies each and every allegation contained in paragraph 2 of the complaint.

3. Admits the allegations of paragraph 3 of the complaint.

4. Has no knowledge with respect to the allegations of paragraph 4 of the complaint; and, therefore, denies the same.

5. Has been advised that payee contends that he never received said check but has no definite knowledge thereof and accordingly denies the allegations of paragraph 5 of the complaint.

6. Admits the allegations of paragraph 6 of the complaint with the following qualifications:

Said check bore the endorsement "Clair A. Barner" when deposited by J. C. Penney Company. This defendant believed that said endorsement was genuine when it accepted said check for collection and upon information and belief J. C. Penney Company believed said endorsement to be genuine when it accepted and deposited same. Upon information and belief at the time the check was cashed in [fol. 8] the J. C. Penney Company store its employees knew the person who presented it by sight, if not by name, or that the person who presented it was introduced by some person known to the employees of J. C. Penney Company, but that due to the long delay of the plaintiff in advising defendant and J. C. Penney Company of the alleged forgery, the employees of J. C. Penney Company were unable to remember any of the details with respect to the cashing of said check.

7. Admits the allegations of paragraph 7 and further alleges that defendant received said money in good faith believing that J. C. Penney Company was entitled to receive the same and paid it over to J. C. Penney Company which received it in good faith.

8. Is advised that the payee of the said check contends that his name is forged, but defendant has no definite knowledge upon this point and accordingly denies the allegations of paragraph 8 of the complaint.

9. That defendant has seen the affidavit filed by payee containing the allegations set forth in paragraph 9 of the complaint but has no definite knowledge concerning same and, therefore, denies the allegations of this paragraph.

10. Denies each and every allegation of paragraph 10 of the complaint.

11. Admits the allegations of paragraph 11 of the complaint subject to the qualifications hereinafter set forth in the affirmative defense.

[fol. 9] FURTHER AND SEPARATE DEFENSE

For a further and separate defense to said complaint the defendant incorporates herein the allegations of the complaint as modified by the denials and additional allegations hereinabove set forth and alleges:

1. That the payee, Clair A. Barner, advised the plaintiff on or before May 10, 1936 that he had not received said check but that the plaintiff notwithstanding this knowledge negligently and carelessly delayed for a period of eight months until January 12, 1937 in informing this defendant and the J. C. Penney Company of the claim of forgery made by the payee. That by reason of the failure and neglect of the plaintiff in promptly informing this defendant and the J. C. Penney Company of the alleged forgery this defendant and J. C. Penney Company have been entirely unable to identify or apprehend the person to whom the money was paid.

2. That plaintiff investigated the alleged forgery and was unable to positively identify the forger. However, upon information and belief plaintiff's agents did secure certain information as a result of said investigation as to the various persons who might have committed said forgery, which said information might have been of value to defendant and J. C. Penney Company in making further efforts to secure reimbursement, that demand was made that plaintiff furnish endorsers with this information in order that they might conduct a further investigation but plaintiff refused to divulge such information and continued to demand payment of defendant.

3. That if plaintiff had notified defendant and J. C. Penney promptly upon its receipt of notice that said check had been cashed for an allegedly improper person, defendant [fol. 10] and J. C. Penney Company could have located such person and recovered the amount of the payment in question. That because of the failure and neglect of the

plaintiff in promptly informing defendant and J. C. Penney Company of the fact that the amount of said check was alleged to have been paid to the wrong person, defendant and J. C. Penney Company have been entirely unable to identify or apprehend the person to whom the money was paid. J. C. Penney Company claims by reason of the foregoing facts to have a defense to defendant's claim against it for reimbursement and has absolutely refused to reimburse defendant.

Wherefore the plaintiff is barred and estopped from prosecuting its alleged cause of action against this defendant.

Wherefore this defendant prays judgment in bar of action and costs.

F. T. Ikeler, Reed, Smith, Shaw & McClay, Attorneys for Defendant, 747 Union Trust Bldg., Pittsburgh, Penna.

[fol. 11] IN UNITED STATES DISTRICT COURT

STIPULATION RE INTERVENTION OF J. C. PENNEY CO.

And now, October 15, 1940, it is hereby stipulated and agreed by and between Reed, Smith, Shaw and McClay, Attorneys for Clearfield Trust Company and J. C. Penney Company, and George Mashank, Attorney for the United States, as follows:

1. The J. C. Penney Company shall intervene and be added as a party defendant in the above stated action with the same force and effect as though an original summons and a copy of the Complaint of the United States filed in the aforesaid action, had been duly issued and served upon the J. C. Penney Company, and properly returned.

2. The J. C. Penney Company may adopt as its answer the answer heretofore filed by the Clearfield Trust Company in the above stated case, with the same force and effect as though the said adopted answer was filed and served within the time and in the manner provided by the Federal Rules of Civil Procedure.

Reed, Smith, Shaw & McClay, by F. T. Ikeler, Attorneys for Clearfield Trust Company and J. C. Penney Company. George Mashank, Attorney for United States.

[fol. 12] ORDER

And now, April 1, 1942, nunc pro tunc as of October 15, 1940, pursuant to the foregoing Stipulation, leave is hereby given to the J. C. Penney Company to intervene and to be added as a party defendant in the above stated case, and it is ordered that the record of this action be marked accordingly.

R. M. Gibson, D. J.

[fol. 13] IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties to the above entitled case that the following facts shall be taken as true and may be read or introduced into evidence by either party without further proof or authentication, without prejudice to the right of either party to object to any portion thereof upon the ground of materiality or relevancy.

1. The plaintiff, the United States of America, by George Marshank, its attorney for the Western District of Pennsylvania, acting under the direction of the Attorney General, has brought this proceeding against the Clearfield Trust Company and J. C. Penney Company. The Clearfield Trust Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and has its principal place of business at Clearfield, Pennsylvania, in the Western District of Pennsylvania, and which, at all times hereinafter mentioned, was engaged in the general business of commercial banking. The J. C. Penney Company is a corporation organized and existing under the laws of the State of Delaware and has its principal place of business at 330 West 34th Street, New York City, New York, and is engaged in the general merchandising business.

2. Check No. 4,797,253, dated April 28, 1936, for $24.20, a true and correct photostatic copy of which is attached hereto and made part hereof and marked Exhibit "A", was drawn on the Treasurer of the United States through the Federal Reserve Bank of Philadelphia by L. V. Witcombe, [fol. 14] Disbursing Clerk, Treasury Department, symbol 70-01-30, to the order of Clair A. Barner.

3. The said check was drawn on or about April 28, 1936 as payment for WPA services rendered by the intended payee, Clair A. Barner, and was placed in the mail properly addressed to Clair A. Barner, Mackeyville, Pennsylvania.

4. The said draft was obtained in some unknown manner by some unknown person other than the intended payee. Said person presented the check to the J. C. Penney Company Store, a branch store owned and operated by the J. C. Penney Company, at Clearfield, Pennsylvania. Said person represented to such store and the employees therein that he was Clair A. Barner, the payee of the check, and identified himself as such to the satisfaction of the said J. C. Penney Company employees. He endorsed the check in the name of Clair A. Barner and gave it to J. C. Penney Company, which it received believing in good faith that he was the owner thereof and entitled thereto, and said J. C. Penney Company paid over to said person cash and/or merchandise having a value of $24.20. The intended payee never received the check, never authorized his endorsement, and never participated in the proceeds of the check.

5. J. C. Penney Company endorsed said check over to the Clearfield Trust Company, which accepted it as agent of J. C. Penney Company for the purpose of collection. Said Clearfield Trust Company endorsed said check in the following form:

"Pay to the order of

Federal Reserve Bank of Philadelphia
Prior Endorsements Guaranteed
60-629 Apr. 30, 1936 60-629
[fol. 15] Clearfield Trust Company
Clearfield, Penna.

3-4 Pay to the order of 3-4

Any bank, banker or trust co.
Prior endorsements Guaranteed
Federal Reserve Bank of Philadelphia,"

and collected said check from the plaintiff through the Federal Reserve Bank of Philadelphia. The Clearfield Trust Company then paid the face amount thereof to J. C. Penney Company.

6. Neither J. C. Penney Company nor the Clearfield Trust Company had any knowledge or suspicion that they had or might have a forged endorsement, but the Clearfield Trust Company received the proceeds in good faith, and then paid the same over to J. C. Penney Company, which received such proceeds in good faith.

7. On or before May 10, 1936, the payee, Clair A. Barner, advised the time keeper of the WPA project on which he was employed and the foreman upon the same project, both of whom were the plaintiff's agents, that he had not received the aforesaid check. This information was duly communicated to other agents of the plaintiff, and on November 30, 1936, said Clair A. Barner executed an affidavit alleging that his endorsement on said check was forgery.

8. The plaintiff did not notify the Clearfield Trust Company or J. C. Penney Company of the alleged forgery of said endorsement of said Clair A. Barner until January 12, 1937, when such notice was given to the Clearfield Trust Company by the Federal Reserve Bank of Philadelphia. On August 31, 1937, the Clearfield Trust Company was first notified that the plaintiff was asking reimbursement upon said check.

[fol. 16] 9. The J. C. Penney Company store in Clearfield, Pennsylvania, cashes many hundreds of checks each year for purchasers or probable purchasers of merchandise. If a check is returned unpaid or is returned for reclamation a short time after the date on which it was cashed, the J. C. Penney Company employees can often locate the person who cashed the check through the one who vouched for him or by checking with the clerk who took the check, and having him proceed immediately to locate the customer who cashed it.

10. At the time the Clearfield Trust Company and J. C. Penney Company were notified of the alleged forgery, none of the J. C. Penney Company employees were able to remember anything about the transaction or the check in question, and although they made diligent inquiries, they have been, and still are, unable to ascertain the identity of, or to locate, the person who presented said check to it or to recover the money and/or merchandise paid over to him. The Clearfield Trust Company acted in the transaction only

as the collection agent of J. C. Penney Company and has no knowledge with respect to the identity of the alleged forger.

11. The Clearfield Trust Company requested J. C. Penney Company to reimburse it in the amount of this draft, but J. C. Penney Company has refused to make such repayment on the ground that because of plaintiff's failure to notify endorsers of the alleged forgery until January 12, 1937, repayment cannot be required under the law.

12. Gwinn & Pell, Attorneys for J. C. Penney Company, wrote plaintiff asking to be advised as to what persons were suspected of forging the check in question, in order that they might have the information to assist in locating the [fol. 17] person who cashed the check to obtain reimbursement for J. C. Penney Company, the inquiry being as follows:

"What disposition did the Secret Service make of the matter; that is, was anyone prosecuted or not? If not was there anyone suspected of committing the crime? If so, what were the grounds of suspicion and why was it considered inadvisable to prosecute?"

The plaintiff replied to the aforesaid inquiry as follows:

"In this connection you are advised that the investigation did not disclose the identity of the negotiator. If the investigation had developed a suspect, it would not be advisable to furnish the name of the suspect and the grounds on which the suspicions were based until a trial had proved the suspicions were well founded."

(Signed) George Mashank, Attorney for United States of America. (Signed) Gwinn & Pell, F. T. Ikeler, Reed, Smith, Shaw & McClay, Attorneys for Clearfield Trust Company and J. C. Penney Company.

[fol. 18] EXHIBIT "A" TO STIPULATION OF FACTS

(Face of Check)

Treasury 4,797,253

Harrisburg, Pa., Apr. 28, 1936

Division of
Disbursement 3

Treasurer of the United States

Through Federal Reserve Bank of Philadelphia 3-4

Thesaur.

Amer. Pay in Dollars $*24 Dollars and .20 Cts.

Septent. $*24.20,
Sigil.

To the Order of Clair A. Barner

1665

Object for which drawn
190653
Emergency Relief

L. V. Witcombe
Disbursing Clerk

Appropriation Act of 1935 70-01-30

(Back)

Form Approved by
Comptroller of the Treasury
January 27, 1913

This check must be indorsed in ink or indelible pencil on the line below by the person in whose favor it is drawn, and the name must be spelled exactly the same as it is on the face of the check.

[fol. 19] If endorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full.

Clair A Barner
(Sign on this line)
J C Penney Co. Inc

Pay to the order of
Federal Reserve Bank of Philadelphia
Prior Endorsements Guaranteed
60-629 Apr 30 1936 60-629
Clearfield Trust Company
Clearfield, Penna.

3-4 Pay to the order of 3-4

Any bank, banker or trust co.
Prior Endorsements Guaranteed
Federal Reserve Bank of Philadelphia.

Received Payment From
The Treasurer of the United States
May-1 1936
Federal Reserve Bank
of Philadelphia

3-4 3-4

[fol. 20] In United States District Court

Opinion

Schoonmaker, Judge:

This case was heard on complaint, answer and stipulation of facts. These are briefly as follows:

On April 28, 1936, a check for $24.20 was drawn by a disbursing clerk of the Treasury Department on the Treasurer of the United States, payable to the order of Clair A. Barner for services rendered by him in Pennsylvania for WPA. The check was sent to him by United States mail at his address at Mackeyville, Pennsylvania. Some unknown person, other than Barner, presented this check to the J. C. Penney Company store in Clearfield, Pennsylvania, representing himself to be Clair A. Barner, the payee of the check, endorsed the name of the payee on the check, and received its equivalent in cash and merchandise. Where-

upon the J. C. Penney Company endorsed said check over to defendant, which endorsed the same, guaranteeing prior endorsements, and collected the same through the Federal Reserve Bank of Philadelphia. On May 10, 1936, Barner notified the timekeeper on his WPA project that he had not received his check, which information was communicated to other agents of plaintiff. On November 30, 1936, Barner executed an affidavit alleging that his endorsement on said check was a forgery. On January 12, 1937, plaintiff notified defendant of such forgery; and on August 31, 1937, plaintiff demanded from defendant reimbursement upon said check. This suit was brought on November 16, 1939.

[fol. 21] On these facts we are of the opinion that the plaintiff cannot recover, because of the unreasonable delay on its part in giving notice of the forgery to the defendant. The check in question was dated at Harrisburg, Pennsylvania, on April 28, 1936. It was payable through the Federal Reserve Bank of Philadelphia.

We conclude therefore that the rights of the parties are to be determined by the law of Pennsylvania: United States vs. Guaranty Trust Company, 293 U. S. 341, 346.

The Pennsylvania Act of April 5, 1849, P. L. 424, 426, relating to commercial paper, provides that where the signature of any "drawer, acceptor or endorser, shall have been forged thereon," recovery back can be had by the payor; but under the principles of commercial law, the party injured must proceed with care and diligence and give proper notice of the forging. See Market Street T. & T. Co. vs. Chelton T. Co., 296 Pa. 330, 339. This, in our opinion, the plaintiff did not do in the instant case. It had notice on or about May 10, 1936, that Barner had not received this check; and on November 30, 1936, it had an affidavit from Barner that the endorsement of his name on the back of the check was a forgery. It gave no notice to the defendant of such forgery until January 12, 1937, and made no demand for reimbursement until August 31, 1937. This was not proceeding with due diligence, and will bar the plaintiff's right of recovery.

The plaintiff relies largely on United States vs. National Exchange Bank, 214 U. S. 303, but in view of our conclusion that this case must be decided in accordance with Pennsylvania law, it is not applicable to the facts of this case.

The complaint will be dismissed. An order may be submitted.

[fol. 22] IN UNITED STATES DISTRICT COURT

ORDER FOR JUDGMENT

And now, to wit, this 15th day of January, 1942, the above entitled case having come on for hearing, it is hereby ordered, adjudged and decreed that the complaint be and hereby it is dismissed, and that judgment be and hereby it is entered in favor of the defendants, Clearfield Trust Company and J. C. Penney Company, and against the plaintiff, the United States of America; all costs to be borne by the plaintiff.

Per Curiam, F. P. Schoonmaker, Judge.

[fol. 23] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Third Circuit from the final judgment entered in this action on January 15, 1942, as follows:

Order for Judgment

And now, to-wit, this 15th day of January, 1942, the above entitled case having come on for hearing, it is hereby ordered, adjudged and decreed that the judgment be and hereby it is entered in favor of the defendants, Clearfield Trust Company and J. C. Penney Company, and against the plaintiff, the United States of America; all costs to be borne by the plaintiff.

Per Curiam, F. P. Schoonmaker, Judge. (Signed) Charles F. Uhl, United States Attorney, by (Signed) George Mashank, Assistant United States Attorney, Attorneys for Plaintiff, United States of America, 633 New Federal Building, Pittsburgh, Pennsylvania.

[fol. 24] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CONTENTS OF RECORD

And now, March 31, 1942, it is hereby agreed and stipulated by and between Reed, Smith, Shaw & McClay, by F. T. Ikeler, Esq., Attorneys for the defendants, and Charles

F. Uhl, United States Attorney, by George Mashank, Assistant United States Attorney, attorneys for the United States, that the Record on appeal in the above stated case shall consist of the following:

1. Relevant Docket entries.
2. Complaint of Plaintiff;
3. Answer of Defendants;
4. Stipulation adding J. C. Penney Company as party defendant;
5. Order of Court granting leave to J. C. Penney Company to intervene;
6. Stipulation of Facts;
7. Opinion of the Court;
8. Order for Judgment;
9. Notice of Appeal;
10. Stipulation as to contents of Record on Appeal;
11. Clerk's Certificate.

Reed, Smith, Shaw & McClay, by F. T. Ikeler, Attorneys for the Defendants. Charles F. Uhl, United States Attorney, by George Mashank, Assistant United States Attorney, Attorneys for the United States.

[fol. 25] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 26] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7979

UNITED STATES OF AMERICA, Appellant,

vs.

CLEARFIELD TRUST COMPANY and J. C. PENNEY COMPANY, Appellees

And afterwards, to wit, the 22d day of May, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 29th day of July, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 27] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7979

UNITED STATES OF AMERICA, *Appellant*,

v.

CLEARFIELD TRUST COMPANY and J. C. PENNEY COMPANY

On Appeal from a Judgment of the District Court of the United States for the Western District of Pennsylvania

OPINION—Filed July 29, 1942

Before Biggs, Maris and Goodrich, *Circuit Judges*

GOODRICH, *Circuit Judge*:

This is an action by the United States to recover the amount of a check drawn by it from the defendant endorsee who received it under a forged endorsement and by whom it had been paid. The check was drawn upon the Treasurer

of the United States, payable through the Federal Reserve Bank of Philadelphia and bore date April 28, 1936. It was [fol. 28] made payable to the order of Clair A. Barner for W. P. A. services rendered by him and was placed in the mail properly addressed to the payee at Mackeyville, Pennsylvania. Some unknown person obtained the check, forged the payee's name and cashed it at the store of J. C. Penney Company in Clearfield, Pennsylvania, who paid value in good faith. J. C. Penney Company endorsed the check to the Clearfield Trust Company which collected it from the plaintiff through the Federal Reserve Bank of Philadelphia. Shortly after this Clair A. Barner notified the timekeeper and the foreman of the W. P. A. project on which he was engaged that he had not received the check just described. It was not, however, until January 12, 1937 that notice was given the defendant of the alleged forgery and not until August 31, 1937 that the defendant was first notified that the plaintiff was asking reimbursement upon the check. Suit was brought against the Clearfield Trust Company on November 16, 1939 and J. C. Penney Company subsequently intervened. The court below gave judgment for the defendant, giving as its reason the delay on the part of the plaintiff in giving notice of the forgery.

If the rights of the plaintiff are to be determined by Pennsylvania decisions the judgment of the lower court was right. It seems to us clear that under the Pennsylvania rule the rights of a drawer to recover against one who has received payment of a check under a forged endorsement are conditioned upon his giving prompt notice of the forgery. Market St. Title & Trust Co. v. Chelten Trust Co., 296 Pa. 230, 145 Atl. 848 (1929). We do not think the force of this rule can be avoided by describing it as a rule of laches and, therefore, not operative against the United States. If it applies at all it precludes recovery for it is hardly arguable here that notice to the defendant was given with reasonable promptness.

The most difficult point in the case is whether the plaintiff's rights are to be limited by the rule of diligence declared by the Pennsylvania courts. The learned trial judge concluded that they were and cited United States v. Guar- [fol. 29] anty Trust Company of New York, 293 U. S. 340 (1934) for the conclusion. That case, however, only declared a conflict of laws rule as to the title acquired in a

foreign country by a transferee under a forged endorsement. It does not settle this case.

We think the question is rather whether the rule of Erie R. R. v. Tompkins, 304 U. S. 64 (1938) applies so that we are constrained to look to the law as declared by the state courts as a measure of the rights and liabilities of the parties. We think it does not so apply. The plaintiff is not in federal court by virtue of diversity of citizenship, but by the expressed provision of the Judicial Code[1] giving it the right to sue. The payment for which this check was given grew out of services performed under an Act of Congress, the Federal Emergency Relief Act. 15 U. S. C. A. ch. 16. The forgery was an offense against the laws of the United States.[2] We think all these facts distinguish the situation to defraud shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States [this includes checks, § 261] shall be fined * * * and imprisoned. * * *" This has been held to cover forged indorsements. Alvarado v. United States, 9 F. (2d) 385 (C. C. A. 9, 1925); Hamil v. United States, 298 Fed. 369 (C. C. A. 5, 1924).

from that presented in Erie R. R. v. Tompkins, supra, where under the diversity of citizenship clause the sole purpose of federal court jurisdiction is to provide a tribunal to dispense justice impartially between citizens of different states. Our conclusion is strongly supported by a group of decisions in which the Supreme Court has been called upon to determine, in the light of Erie R. R. v. Tompkins and cases following it, whether a particular question not expressly answered by the Constitution, treaties or statutes of the United States is to be determined by reference to state precedents or by federal courts in the light of their own body of decisions and their own notions of the proper rule of law. Thus the matter of interest in the recovery of taxes improperly assessed upon Indian lands was held to be a matter concerning which state decisions were not controlling.[3] The same result was reached [fol. 30] where the problem was "the judicial determination

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[1] 28 U. S. C. A. § 41(1).

[2] 18 U. S. C. A. § 262: covering "Whoever, with intent

[3] Board of Commissioners v. United States, 308 U. S. 343 (1939).

of the legal consequences which flow from acts condemned as unlawful by the National Bank Act.' * * *"[4] So, too, the liability for interest of a surety on a bond furnished the United States to accompany a taxpayer's claim for abatement of tax liability was held to be a question upon which state decisions did not control the answer given by the federal court.[5] Likewise, the majority of the Court held it a federal question whether one who had given a note to a bank as part of a plan to conceal its overdue bonds was liable even though the note was given prior to the formation of the Federal Deposit Insurance Corporation.[6] In

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[4] Deitrick v. Greaney, 309 U. S. 190 (1940). In this case the United States was not a party litigant but the plaintiff was a receiver of a National Bank and the receiver of the National Bank sues in federal court as an officer of the United States. 28 U. S. C. A. § 41 (16).

[5] Royal Indemnity Co. v. United States, 313 U. S. 289 (1941).

[6] D'Oench, Duhme & Co., Inc., v. Federal Deposit Insurance Corporation, — U. S. — (1942). The concurring opinion of Mr. Justice Jackson called for a more express delimitation of Erie R. R. v. Tompkins and Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487 (1941) than the majority thought it necessary to make. The majority, by stating that the question was a federal one in the particular case obviously were not called upon, in order to decide it, to determine whether Erie R. R. v. Tompkins was irrelevant in all cases not based upon diversity of citizenship. The question was avoided in United States v. Bethlehem Steel Corporation, 315 U. S. 289 (1942). Decisions of lower federal courts since Erie R. R. v. Tompkins are in disagreement as to whether the rights and liabilities under a contract made by the United States are to be measured by the decisions of the state courts or by the laws declared in federal cases. To the effect that the state decisions do not apply see: Kolker v. United States, 40 F. Supp. 972 (D. Md. 1941); United States v. Grogan, 39 F. Supp. 819 (D. Mont. 1941); Byron Jackson Co. v. United States, 35 F. Supp. 665 (S. D. Cal. 1940). Contra: Alameda County v. United States, 124 F. (2d) 611 (C. C. A. 9, 1941); United States v. Brookridge Farm, Inc., 111 F. (2d) 461 (C. C. A. 10, 1940).

the absence of an authoritative decision by the Supreme Court of the United States to the effect that Erie R. R. v. Tompkins applies only in cases of diversity of citizenship, a subordinate federal tribunal would be exhibiting uncalled for temerity in offering such generalizations. We do not do so here. But we do think, however, that in this case the facts in litigation originate fully as directly from the Constitution and statutes of the United States as in the Supreme Court cases just mentioned and in this case, as [fol. 31] well as in those, the federal courts are not bound in their determination of the legal consequences of the transaction by what the courts of the state, where the operative facts occurred, have held with regard to the general question involved.

Since it is concluded that the Pennsylvania decisions are not controlling, the matter is to be decided as a federal question from the "materials in hand." In this instance we already have an authoritative decision in United States v. National Exchange Bank of Providence, 214 U.S. 302 (1909). Here it was held that the United States could recover from a bank which received the money on pension checks where the names of the payees had been forged and that the right to recover was not conditioned either on demand or the giving of notice. This decision makes the federal rule in cases where it is applicable for all lower federal courts. It governs us here. Since that decision it has been several times held that where notice of the forgery has been unreasonably delayed the endorsee under the forged endorsement is nevertheless protected if he shows loss resulting to him from the unreasonable delay.[8] The facts in this case, however, fall short of such proof.[9]

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[7] Compare the concurring opinion of Mr. Justice Jackson in the D'Oench case referred to in footnote 6.

[8] Ladd & Tilton Bank v. United States, 30 F. (2d) 334 (C.C.A. 9, 1929); United States v. National Rockland Bank, 35 F. Supp. 912 (D. Mass. 1940); United States v. National City Bank of New York, 28 F. Supp. 144 (S.D. N.Y. 1939).

[9] The facts were stipulated by the parties and relevant paragraphs on this point read:

"9. The J. C. Penney Company store in Clearfield, Pennsylvania, cashes many hundreds of checks each year for

purchasers or probable purchasers of merchandise. If a [fol. 32] The most they show is that if notice is given promptly J. C. Penney employees can often locate the person who cashed a check at their store and that in this case inquiries have failed to locate the person who presented the check out of which this litigation arises. The most that can be concluded from this is that if they had had a prompter notice they might have been able to locate the imposter. This is insufficient to take the case out of the rule of the United States v. National Exchange Bank of Providence, supra.

The judgment of the District Court is reversed and the case remanded for proceedings not inconsistent with this opinion.

A true Copy: Teste:

——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

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check is returned unpaid or is returned for reclamation a short time after the date on which it was cashed, the J. C. Penney Company employees can often locate the person who cashed the check through the one who vouched for him or by checking with the clerk who took the check, and having him proceed immediately to locate the customer who cashed it."

"10. At the time the Clearfield Trust Company and J. C. Penney Company were notified of the alleged forgery, none of the J. C. Penney Company employees were able to remember anything about the transaction or the check in question, and although they made diligent inquiries, they have been, and still are, unable to ascertain the identity of, or to locate, the person who presented said check to it or to recover the money and or merchandise paid over to him. The Clearfield Trust Company acted in the transaction only as the collection agent of J. C. Penney Company and has no knowledge with respect to the identity of the alleged forger."

[fol. 33] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7979

UNITED STATES OF AMERICA, Appellant,

vs.

CLEARFIELD TRUST COMPANY and J. C. PENNEY COMPANY

On appeal from the District Court of the United States, for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the case is remanded to the said District Court for proceedings not inconsistent with the opinion of this court.

Goodrich, Circuit Judge.

July 29, 1942.

Endorsements: Order Reversing Judgment of the District Court, etc. Received & Filed July 29, 1942. Wm. P. Rowland, Clerk.

[fol. 34] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Record on Appeal, and proceedings in this court, in the case of United States of America, Appellant, vs. Clearfield Trust Company and J. C. Penney Company, Appellees (No. 7979) on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 19th day of October in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the United States the one hundred and sixty-seventh.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 7, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Roswell D. Pine, Jr. File No. 46,991 U. S. Circuit Court of Appeals, Third Circuit, Term No. 490. Clearfield Trust Company, a Corporation, and J. C. Penney Company, a Corporation, Petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed October 24, 1942. Term No. 490 O. T. 1942.

(3924)